(8)

No. 91-886

In The Supreme Court Of The United States

OCTOBER TERM, 1991

BOB REVES, ROBERT H. GIBBS, AND FRANCES GRAHAM, AS REPRESENTATIVES OF A CLASS OF NOTEHOLDERS,

Petitioners,

v.

ERNST & YOUNG

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C. IN SUPPORT OF PETITIONERS

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On Writ of Certiorari
to the United States Court of Appeals
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BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of Trial Lawyers for Public Justice, P.C.

(TLPJ).* It is submitted with the consent of both Petitioners and Respondent. TLPJ is a public interest law firm that represents victims of the abuse of power in our society. TLPJ selects its cases from among those that will advance the cause of justice, educate the public, modify corporate or government behavior, or improve the access of victims to the courts to remedy injustice. Supported by over 1200 lawyers in the United States and the world, it is the only public interest law firm in this Country dedicated to using civil remedies for the public good.

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*The assistance in the preparation of this brief of Notre Dame law students Aileen M. Bigelow ('93), Edmond F. Foley ('92), David A. Haimes ('93), Mary C. Kinsella ('92), Paul B. McCarthy ('93), Andrew M. McIlvaine ('93) and Lynne M. Pregenzer ('93) is hereby acknowledged.

Based on its experience with the statutes, TLPJ firmly believes that the Racketeer Influenced and Corrupt Organizations Act (RICO) and its state counterparts are among the few effective remedies available to victims of crime to obtain adequate legal redress, particularly when they are cheated by various forms of fraud. In this brief, TLPJ advocates a construction of "conduct" within federal RICO, not limited to manage or operate, that will maintain congressionally-mandated access to the federal courts and the adequate compensation provided to such victims in the remedial provisions of RICO, 18 U.S.C. §1964.

SUMMARY OF ARGUMENT

In 1970, Congress enacted P.L. 91-

452, the Organized Crime Control Act, Title IX of which is known as "RICO." This Court ought to adopt a straightforward definition of "conduct" within RICO, not limited to manage or operate, that reflects RICO's text, legislative history and policy. Professionals, including accountants and lawyers, should not be insulated from responsibility for their unlawful acts by an artificially restrictive construction of "conduct." In enacting RICO, Congress was concerned with various forms of criminal conduct, including fraud. Nothing that has happened since then undermines Congress' 1970 judgment. Financial fraud, in which professionals play a pivotal role, costs the Nation billions of dollars annually. It victimizes small businesses, savers, investors, homeowners, the elderly,

consumers, and federal, state, and local governments. Because attempts to restrict RICO judicially are rooted in false myths and are constitutionally improper, this Court should reject them.

I. CONGRESS DELIBERATELY CRAFTED RICO AS A BROAD REMEDY FOR VICTIMS OF PATTERNS OF CRIMINAL CONDUCT INVOLVING ENTERPRISES.

A. RICO Provides a Critical Remedial Framework For Victims of Financial Fraud.

1. The Background of RICO.

In 1970, Congress enacted P.L. 91-452, the Organized Crime Control Act, Title IX of which is known as RICO.[1]

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[1] Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (1988 & Supp. I. 1989)). See generally G. Robert Blakey & Thomas A. Perry, An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals For Reform, 43 Vand. L. Rev. 851 (1990) (hereinafter "Myths"); G. Robert Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre

Title IX addresses "enterprise criminality"[2] involving fraud.[3]

Dame L. Rev. 237 (1982) (hereinafter "Civil Fraud Action"); G. Robert Blakey & Scott Cessar, Equitable Relief Under Civil RICO, 62 Notre Dame L. Rev. 526 (1987) (hereinafter "Equitable Relief"); G. Robert Blakey & Brian Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts--Criminal and Civil Remedies, 53 Temple L.Q. 1009 (1980) (hereinafter "Basic Concepts"). Three recent symposia are: Symposium: The 20th Anniversary of the Racketeer Influenced and Corrupt Organizations Act (1970-1990), 64 St. John's L. Rev. 701 (1990); Symposium: Reforming RICO: If, Why, and How?, 43 Vand. L. Rev. 621 (1990); and Symposium: Law and The Continuing Enterprise: Perspectives on RICO, 65 Notre Dame L. Rev. 872 (1990). Twenty-nine states have RICO-type legislation. Myths at 988-1011. See Morehead v. State, 383 So. 2d 629, 630-31 (Fla. 1980) (Florida RICO read in light of federal RICO).

[2] United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983) ("'enterprise criminality'" consists of "all types of organized criminal behavior '[ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors.'") (quoting Basic Concepts at 1013-14), cert. denied, 465 U.S. 1005

Congress, particularly concerned with "fraud,"[4] wanted to protect "innocent investors."[5] Because Congress found that "the sanctions and remedies available" were "unnecessarily limited in scope and impact,"[6] Congress enacted RICO to provide criminal and civil sanctions, including imprisonment, forfeiture, injunctions, and treble damage relief for "person[s] injured" in their "business or property" "by reason of" a violation of the statute.[7] "[T]he major purpose of [RICO was] to address the infiltration of

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(1984).

[3] Civil Fraud Action at 300-06 (analysis of RICO's various predicate offenses)

[4] 84 Stat. 922 (1970).

[5] Id. at 923.

[6] Id.

[7] 18 U.S.C. §§ 1963, 1964(c).

legitimate business by organized crime," but RICO was designed to reach both "illegitimate" and "legitimate" enterprises.[8] "[T]he notion that RICO is limited to organized crime [, however,] finds no support in the Act's text, and is at odds with the tenor of its legislative history...."[9] "Congress drafted RICO broadly enough to encompass a wide range of criminal activity...."[10] "[Legitimate business persons] enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."[11] Accordingly, RICO fits

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[8] United States v. Turkette, 452 U.S. 576, 590-91 (1981).

[9] H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 244-48 (1988).

[10] Id. at 248-49.

[11] Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 499 (1985).

well into a traditional pattern of federal legislation enacted as general reform, aimed at a specific target, but not limited to the specific target.[12]

Congress directed that RICO "be liberally construed to effectuate its remedial purposes."[13] If RICO's language

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[12] See, e.g., United States v. Culbert, 435 U.S. 371, 373-74 (1978); Perrin v. United States, 444 U.S. 37, 46 (1979); United States v. Fabrizio, 385 U.S. 263, 265-67 (1966); Bell v. United States, 462 U.S. 356, 358-62 (1983); Caminetti v. United States, 242 U.S. 470, 485-90 (1917). See generally Equitable Relief at 529 n.13 (other cases collected); id. at 568 n.189 (similar drafting of Klu Klux Klan Act of 1871 and Sherman Antitrust Act of 1890); G. Robert Blakey, Definition of Organized Crime in Statutes and Law Enforcement Administration, in President's Comm. on Organized Crime, Report to The President And The Attorney General--The Impact: Organized Crime Today 511-80 (April 1986).

[13] 84 Stat. 922, 947 (1970).

is plain, it controls.[14] If its language, syntax, or context is ambiguous, the construction that would "effectuate its remedial purposes" "by providing enhanced sanctions and new remedies" is to be adopted.[15] Its language is to be read in the same fashion, whatever the character of the suit.[16]

"Congress [in enacting RICO] was well aware that it was entering a new domain."[17] An issue was whether RICO should preempt other remedies. Congress, however, saved "provision[s] of federal, state, or other law imposing criminal penalties or affording civil remedies in addition to those provided for" in RICO.[18]

"Congress enacted RICO in order to supplement, not supplant, the available remedies since it thought those remedies offered too little protection for the

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[14] Turkette, 452 U.S. at 587 n.10; Russello v. United States, 464 U.S. 16, 29 (1983); Shearson American Express, Inc. v. McMahon, 482 U.S. 220, 239, reh'g denied, 483 U.S. 1056 (1987); United States v. Monsanto, 491 U.S. 600, 606 (1989); H.J. Inc., 492 U.S. at 249.

[15] 84 Stat. 922, 947 (1970); Turkette, 452 U.S. at 487-88, 593; Russello, 464 U.S. at 27; Sedima, 473 U.S. at 497-98; Monsanto, 491 U.S. at 609; Tafflin v. Levitt, 493 U.S. 455, 467, reh'g denied, 495 U.S. 915 (1990).

[16] Sedima, 473 U.S. at 489; Shearson, 482 U.S. at 239.

[17] Turkette, 452 U.S. at 586.

[18] 84 Stat. 922, 947 (1970). Such clauses are a common feature of federal statutes. See, e.g., Securities Exchange Act of 1934, ch. 404, § 28(a), 48 Stat. 881, 903 (codified as amended at 15 U.S.C. §78bb(a) (1988)) ("rights and remedies" "in addition" to "any and all other rights" that exist).

victims."[19] Such overlap between statutes "is neither unusual nor unfortunate."[20] The existence of cumulative remedies furthers remedial purposes.[21]

2. Standards Of Unlawful Conduct Under RICO.

Title 18, United States Code, Section 1962, sets forth standards of "unlawful" conduct. Section 1963 sets out criminal penalties, and Section 1964 sets out civil remedies. RICO is not primarily criminal and punitive, but

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[19] Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 392 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985). See Michael Goldsmith, Civil RICO Reform, 71 Minn. L. Rev. 827, 840-48 (1987).

[20] SEC v. National Sec., Inc., 390 U.S. 453, 468 (1969).

[21] Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983).

civil and remedial.[22]

a. Person.

Title 18, United States Code, Section 1961(3), in relevant part, provides:

> (3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property....

b. Standards.

Title 18, United States Code,

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[22] Turkette, 452 U.S. at 592-93; Sedima, 473 U.S. at 497-98; Shearson, 482 U.S. at 238-42; Tafflin, 493 U.S. at 467 (citing Sedima). Statutory classifications control over federal common law classifications. City of Milwaukee v. Illinois, 451 U.S. 304, 312-15 (1982). Such statutory classifications are entitled to great deference. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984). See also 115 Cong. Rec. 6993 (1969) (Stat. of Sen. Hruska) ("[T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill."); 116 Cong. Rec. 602 (1970) (Stat. of Sen. Hruska) ("the principal value of this legislation may well be found to exist in its civil provisions").

Section 1962(c), in relevant part, provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in ... interstate ... commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ... (emphasis added).

Like the antitrust statutes,[23] RICO's civil provisions "create a private enforcement mechanism that...deter[s] violators....[and] provide[s] ample

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[23] S. Rep. No. 617, 91st Cong., 1st Sess. 81, 157-61 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56-60 (1970). RICO and the antitrust statutes are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." Carl Kaysen & Donald Turner, Antitrust Policy 17 (1959). RICO focuses on the first two; antitrust laws focus on the third. See also American Column Lumber Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exerted through force or fraud or agreement.").

compensation to the victims."[24] RICO's treble damage provisions "provide strong incentives to civil litigants and are integral to the effort of Congress to enlist the aid of civil claimants in deterring" violations of RICO.[25] Such "private...litigation is one of the surest weapons for effective enforcement"[26] of the law; it "provide[s] a significant supplement to the limited resources available to [the government]."[27]

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[24] Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982).

[25] Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165 (5th Cir. 1984).

[26] Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965) (quoting Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965)), reh'g denied, 382 U.S. 1001 (1966).

[27] Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979). In fact, between 1960 and 1980, of the 22,585 civil and

B. The Eighth Circuit Adopted A Restrictive Construction of "Conduct" Under RICO That is Inconsistent with RICO's Plain Meaning, P.L. 91-452 as a Whole, the Congressional Mandate That RICO Be Liberally Construed, and Congress' Own Understanding of RICO.

Following the dictum in its prior decision in Bennett v. Berg,[28] the Eighth Circuit held in the instant litigation that "conduct" within RICO "ordinarily

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criminal cases brought under the antitrust provisions by the government or private parties, 85% were instituted by private plaintiffs. U.S. Department of Justice, Source Book on Criminal Justice Statistics 431 (1981). Professor (now Judge) Posner also argues forcefully on economic grounds for private enforcement of more than actual damages awards against all forms of deliberate antisocial conduct, particularly where the factor of concealment is present. Richard Posner, Economic Analysis of Law 462 (private enforcement), 143, 272 (more than actual damage awards, for deliberate conduct), 235 (concealment) (2d ed. 1977). On the history and economic rationale of treble damages, see Equitable Relief at 530 n.17.

[28] 710 F.2d 1361, 1364 (8th Cir.) (en banc), cert. denied, 464 U.S. 1008 (1983).

will require some participation in the operation or management of the enterprise itself." 937 F.2d 1310, 1324, cert. granted, 60 U.S.L.W. 3578 (U.S. Feb. 24, 1992) (No. 91-886). Auditing, meeting with a board of directors to explain the audits, and presentations at annual meetings, does not, the Court held, constitute such operation or management. 937 F.2d at 1324. As such, the Eighth Circuit--consistent with the D.C. Circuit and earlier, but no longer controlling, Fourth Circuit precedent, and in opposition to precedent in the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits--continued to follow its own "restrictive view."[29]

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[29] See Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 952-95 (D.C. Cir. 1990) (en banc) ("most restrictive") (review of 2d, 4th, 5th, 7th and 11th Cir. precedent), cert. denied, 111 S. Ct.

1. A Restrictive Construction of "Conduct" Is Inconsistent With RICO's Plain Meaning.

While the interpretation of RICO begins with the plain language of its text, structure, legislative history, and congressional policy are also important.[30] "Person," which defines who

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2839 (1991); United States v. Provenzano, 688 F.2d 194, 200 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Webster, 639 F.2d 174, 185 (4th Cir. 1981) (earlier manage or operate test no longer controlling), modified on other grounds, 669 F.2d 185 (4th Cir.), cert. denied, 456 U.S. 935 (1982); United States v. Gaoud, 777 F.2d 1105, 1116 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); Blake v. Diedorff, 856 F.2d 1365, 1372 (9th Cir. 1988).

[30] This Court in Turkette, Russello, Sedima, Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143 (1987) Shearson, Caplin & Drysdale v. United States, 491 U.S. 617 (1989), Monsanto, Tafflin, H.J. Inc. and SIPC v. Holmes, No. 90-727 decided March 24, 1992, established the basic principles that govern RICO:

(1) read the language of the statute (Turkette, 452 U.S. at 580, 593; Russello, 464 U.S. at 20 (citing Turkette); Sedima, 473 U.S.

at 495 n.13; Shearson, 482 U.S. at 227; Monsanto, 491 U.S. at 606 (citing Turkette); H.J. Inc., 492 U.S. at 237 (citing Russello));

(2) language includes its structure (Turkette, 452 U.S. at 582, 587; Russello, 464 U.S. at 22-23; Sedima, 473 U.S. at 490 n.8, 496 n.14; Agency Holding Corp., 483 U.S. at 152);

(3) language should be read in its ordinary or plain meaning, but must be viewed in context (Turkette, 452 U.S. at 580, 583 n.5, 587; Russello, 464 U.S. at 20 (citing Turkette), 21-23, 25; Sedima, 473 U.S. at 495 n.13; H.J. Inc., 492 U.S. at 238 (citing Richards v. United States, 369 U.S. 1, 9 (1962)):

(4) language should not be read differently in criminal and civil proceedings (Sedima, 473 U.S. at 489, 492; Shearson, 482 U.S. at 239-40) (citing Sedima));

(5) look to the legislative history of the statute (Turkette, 452 U.S. at 586, 589; Sedima, 473 U.S. at 486, 489; Shearson, 482 U.S. at 238-41; Agency Holding Corp., 483 U.S. at 151; Monsanto, 491 U.S. at 613; H.J. Inc., 492 U.S. at 236-39 (citing Sedima); Tafflin, 493 U.S. at 464);

(6) look to the policy of the statute (Turkette, 452 U.S. at 590; Russello, 464 U.S. at 24; Sedima, 473 U.S. at 493; Tafflin, 493 U.S. at 467);

may violate RICO, includes "any individual or entity." 18 U.S.C. § 1961(3). "Any" means "all", not "some,

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(7) the statute was aimed at the infiltration of legitimate business by organized crime (Turkette, 452 U.S. at 591; Russello, 464 U.S. at 27, 28 (citing Turkette); Caplin & Drysdale, 491 U.S. at 630; H.J. Inc., 492 U.S. at 245 (citing Russello and Turkette));

(8) the statute was not limited to the infiltration of legitimate business by organized crime (Turkette, 452 U.S. at 590-91; Russello, 464 U.S. at 28; Sedima, 473 U.S. at 495, 499; H.J. Inc., 492 U.S. at 242-49 (citing Sedima));

(9) the statute is to be broadly read and liberally construed (Turkette, 452 U.S. at 587, 593; Russello, 464 U.S. at 21; Sedima, 473 U.S. at 491-92 n.10, 497-98; Monsanto, 491 U.S. at 609 (citing Sedima); H.J. Inc., 492 U.S. at 237; Tafflin, 493 U.S. at 467 (citing Sedima)); and

(10) the civil enforcement mechanism of the statute was modeled on the similar provision of the antitrust laws (Sedima 473 U.S. at 489; Shearson 482 U.S. at 241; Agency Holding Corp., 483 U.S. at 150-51; SIPC, slip opinion at 7).

but not others."[31] No distinction is made between "insiders" or "outsiders."[32] Inculpation under RICO is not limited to "mobsters." Sedima, 473 U.S. at 495 ("not just mobster"). White-collar professionals, too, are not to be automatically exculpated.[33]

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[31] Mobil Oil Exploration v. United Distribution Co., 111 S. Ct. 615, 623 (1991) (since "'any' encompasses 'all'"...the statute is clear and unambiguous [and] that is the end of the matter...") (citing Sullivan v. Stroop, 110 S. Ct. 2499, 2502 (1990) (quoting K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)).

[32] See, e.g., Schacht v. Brown, 711 F.2d 1343, 1360 (7th Cir.) ("the RICO net is woven tightly to trap even the smallest fish") (quoting United States v. Elliot, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978)) (accountants liable in insurance fraud), cert. denied 464 U.S. 1002 (1983).

[33] See, e.g., Furman v. Cirrito, 741 F.2d 524, 529 (2nd Cir.) (RICO includes "no exception for businessmen, for white-collar workers, for bankers, or for stockbrokers") (Pratt, J.), vacated in part on other grounds, 473 U.S. 922 (1985).

The language "to conduct or participate, directly or indirectly, in the conduct of...[an] enterprise's affairs" is easily understood as a matter of plain meaning. As such, "[t]here is no warrant for seeking refined arguments to show that the statute does not mean what it says." United States v. Wurzbach, 280 U.S. 396, 398 (1930) (Holmes, J.). The key distinction is in the use of "conduct" in the relevant language as a verb ("to conduct") and as a noun ("conduct"). Conduct as a verb is defined as "[t]o manage; direct; lead; have direction, carry on; regulate; do business." Black's Law Dictionary 367 (4th ed. 1957). Conduct as a noun, however, is defined as "[p]ersonal behavior; deportment; mode of action; any

positive or negative act." Id.[34] In the relevant language, "to conduct" is then stated in the disjunctive ("or") with "participate," which is, in turn, defined as "to receive or have a part or share of; to partake of; experience in common with others; to have or enjoy a part or share in common with others; partake; as to 'participate' in a discussion. To take a part in; as to participate in joy

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[34] See also The Compact Edition of Oxford English Dictionary 508 (1971) ("The notion of direction or leadership is often obscured or lost; e.g., an investigation is conducted by all those who take part in it"); Webster's Seventh New Collegiate Dictionary 173 (1970) ("2. management... 3....personal behavior"); Webster's New Dictionary of Synonyms 174 (1971) ("conduct may imply the act of an agent who is both the leader and the person responsible for the acts and achievements of a group...but often the idea of leadership is lost or obscured and the stress is placed on a carrying on by all or by many of the participants....").

or sorrows." Id. at 1275.[35]

As such, while "conduct" as a verb ("to conduct") may mean management, direction, etc., Congress manifestly intended to cast a wider net, since it added to "to conduct" in the disjunctive ("or") "[to] participate directly or indirectly." See Russello, 464 U.S. at 21 ("RICO...utilize[s] terms and concepts of breadth [,including] 'participate'"). Clearly, too, "conduct" in the relevant language ("the conduct of") is used as a noun. As such, it means "behavior, deportment, mode of action, etc." If it is read to mean "management," its placement in the sentence becomes superfluous. The sentence would read "to

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[35] See also "particeps criminis," which is Latin for "participant in a crime; an accomplice." Black's Law Dictionary 1274 (4th ed. 1957).

manage...in the management of." While if it means "behavior," the sentence would--more plausibly--read "to manage...in the behavior, deportment, or mode of action of." Plain meaning, therefore, belies the Eighth Circuit's construction of RICO. As such, its restrictive--and superfluous--reading ought not be adopted by this Court.[36]

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[36] It is not the law in comparable provisions. "Conduct" and "control" are synonyms. Webster's New Dictionary of Synonyms 174 (1971). Section 20 of the Securities Exchange Act of 1934, 48 Stat. 881, 899 (codified as amended at 15 U.S.C. § 78 t[a] (1988)) ("directly or indirectly controls"), however, extends to accountants. Sharp v. Coopers & Lybrand, 649 F.2d 175, 185 (3d Cir. 1981), cert. denied, 455 U.S. 938 (1982), overruled on other grounds; In Re Data Access Securities Litig., 843 F.2d 1537 (3d Cir. 1988). See also Commerford v. Olson, 794 F.2d 1319, 1322 (8th Cir. 1986) (Sharp followed).

If "conduct" within RICO were restricted to manage or operate, it could, moreover, lead to a management only rule. Compare United States v. Pino-Perez, 830 F.2d 1230, 1237 (7th Cir.) (en banc) (principal in the second

2. A Restrictive Construction of "Conduct" Within RICO Is Inconsistent with P.L. 91-452 As A Whole.

Repeatedly, this Court has read P.L. 91-452 as a whole. Iannelli v. United States,[37] (Title VIII (gambling) read in light of Title X (dangerous special offender)); Sedima, 473 U.S. at 489 n.7. (Title IX RICO read in light of Title X (dangerous special offender)); H.J. Inc., 492 U.S. at 239-40 (Title IX (RICO) read in light of Title X (dangerous special offender)) ("[W]e may take guidance from a provision elsewhere in...P.L. 91-452"). As P.L. 91-452 is "a carefully crafted piece of legislation," Iannelli, 420 U.S. at 789, here, too, this Court's task is made easier if it looks to Title VIII (18 U.S.C. §§ 1511, 1955) and Title X (18 U.S.C. §§ 3575, 3577). These other provisions enacted by P.L. 91-452 show Congress' intent in Title IX.

18 U.S.C. § 1511(a), in relevant part, provides:

> It shall be unlawful...to conspire to obstruct the enforcement of the criminal laws of a State...with the

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degree liability possible under 21 U.S.C. § 848 (CCE or Drug Kingpin statute)), cert. denied, 493 U.S. 901 (1989) with United States v. Amen, 831 F.2d 373, 381-82 (2nd Cir. 1987) (liability under § 848 limited to principal in the first degree), cert. denied, 485 U.S. 1021 (1987). RICO then would be eviscerated as an effective weapon against criminal groups, for unlike CCE, RICO's predicates include state offenses; a failure to convict under RICO might well lead to a failure to convict at all. RICO ought not to be so hobbled. See generally Federal Government's Use of The RICO Statute and Other Efforts Against Organized Crime, S. Rep. No. 101-407, 101st Cong., 2nd Sess. 31-36 (1990) (RICO effective against organized crime); Wayne R. LaFave and Austin W. Scott, Jr. Criminal Law § 6.8(c) (2d ed. 1986) (person who may not directly commit an offense may be convicted as accomplice).

[37] 420 U.S. 770, 786-91 (1975), overruled on other grounds, Brown v. Ohio, 432 U.S. 161 (1977).

intent to facilitate an illegal gambling business if--

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(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business (emphasis added).

18 U.S.C. § 1955(a), in relevant part, provides:

Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be....(emphasis added).[38]

This Court--and the prevailing view among the circuits--holds that "conduct" in 18 U.S.C. §§ 1511 and 1955 is to be

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[38] See S. Rep. No. 617, 91st Cong., 1st Sess. 155 (1969) ("officials covered by [Senate passed text of §§ 1511, 1955] are not to be artificially limited, and participation...is to be understood comprehensively"); H. Rep. No. 1549, 91st Cong., 2d Sess. 53 (1970) ("The term 'conducts' [in the enacted texts of §§ 1511, 1955] refers both to high level bosses and street level employees.").

read without an artificial restriction. See, e.g., Sanabria v. United States, 437 U.S. 54, 70 n.26 (1978) ("conduct" proscribes "any degree of participation in an illegal gambling business"); United States v. Zannino, 895 F.2d 1, 10 (1st Cir.), cert. denied, 494 U.S. 1082 (1990).[39] Similarly worded statutes in pari materia should receive a similar

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[39] Significantly, when the Fifth Circuit in Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 970 (11th Cir. 1986) rejected, in civil litigation under RICO, the manage or operate test for "conduct," it properly relied on its prior decision in United States v. Martino, 648 F.2d 367, 382 (5th Cir. 1981), aff'd on other grounds, 464 U.S. 16 (1983), a criminal prosecution, which, in turn, relied upon United States v. Tucker, 638 F.2d 1292, 1295-96 (5th Cir.) (waitress who serves drinks conducts illegal gambling business under 18 U.S.C. § 1955, since her services are "necessary or helpful" to the operation of the enterprise), cert. denied, 454 U.S. 833 (1981). The Fifth Circuit's reading of "conduct" in RICO in light of "conduct" in § 1955 was principled. This Court should do no less.

construction. SIPC, slip opinion at 8-9 ("by reason of" in Section 1964(C) read in light of "by reason of" in §4 of the Clayton Act).[40]

18 U.S.C. § 3575(c), in relevant part, as enacted in 1970 as part of Title X of P.L. 91-452, but now repealed, then provided:

> A defendant is a special offender...if--
>
> (1) xxx (recidivist provisions)
>
> (2) the defendant committed such felony as part of a pattern of conduct...in which he manifested special skill or expertise; or
>
> (3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy...to engage in a pattern of conduct...,and the

[40] See also Erlenbaugh v. United States, 409 U.S. 239, 243 (1972); United States v. Stewart, 311 U.S. 60, 64-65 (1940).

> defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct (emphasis added).[41]

18 U.S.C. § 3577, as enacted in 1970 as part of Title X of P.L. 91-452, but now repealed, then provided:

> No limitation shall be placed on the information

[41] See S. Rep. No. 617, 91st Cong., 1st Sess. 164-65 (1969) ("Paragraph (2)...is designed to deal with the professional offender, who may neither be a recidivist nor play a leadership role.... The circumstance of the conduct itself must demonstrate that the offender is a professional possessing special skill or expertise.... The phrase 'skill or expertise' is meant broadly....xxx Paragraph (3)...is designed to deal...with...[t]hose who personally play or are to play leadership roles....); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 61-62 (1970) ("Paragraph (2)...is designed to deal with the professional offender, who may neither be a convicted recidivist nor play a leadership role....xxx Paragraph (3)...is designed to deal primarily with...[t]hose who personally play...leadership roles....").

> concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence (emphasis added).

Chief Justice John Marshall made the point more than one hundred years ago: "[A] law is the best expositor of itself."[42] Clearly, Congress used "conduct" primarily in the sense of "behavior" in the provisions it added to Title 18 by P.L. 91-452. When it wanted to restrict its focus to particular aspects of participation in such behavior, it chose appropriate language. Had Congress intended "manage or operate" each time it used "conduct" in the statute, it would have said it. Sedima, 473 U.S. at 489; Russello, 464 U.S. at

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[42] Pennington v. Coxe, 6 U.S. (2 Cranch) 34, 52 (1804).

23; Turkette, 452 U.S. at 581.[43]

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[43] Throughout the United States Code, when Congress creates criminal or civil liability for those who hold positions of management, it consistently uses a form of the word "manage." See, e.g., 21 U.S.C. §848 (1991) (CCE) ("a person is engaged in a continuing criminal enterprise if...such person occupies a position of organizer, a supervisory position, or other position of management") (emphasis added); Garrett v. United States, 471 U.S. 773, 781 (1985) ("This language is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers.") See also Edward J. Devitt & Charles B. Blackmar, Federal Jury Practice & Instructions §55.07 (1990) ("The term 'organizer' and the terms 'supervisory position' and 'position of management' are to be given their usual and ordinary meanings. These words imply the exercise of power or authority by a person who occupies some position of management or supervision.") See also 18 U.S.C. §1952 (1991) ("Whoever travels in interstate commerce with intent to...otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity...") (emphasis added). Despite the specific use of the word "manage" in §1952, courts, however, consistently interpret the phrase "promote, manage, establish, carry on, or facilitate" to mean "any act that would cause the 'unlawful activity' described in the indictment to be accomplished or

3. A Restrictive Construction of Conduct Within RICO Is Inconsistent With The Congressional Mandate That RICO Be Liberally Construed.

RICO must be "liberally construed to effectuate its remedial purposes."[44]

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to assist the 'unlawful activity' in any way." See, e.g., U.S. v. Markowski, 772 F.2d 358, 364 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986). See also Devitt & Blackmar, supra at §46.05. Other Title 18 offenses are construed similarly. See, e.g., 18 U.S.C. §1956 (1991) ("conduct...financial transactions"); United States v. Skinner, 946 F.2d 176, 178 (2d Cir. 1991) (broad construction). A similar use of "conduct" is made in the Sentencing Guidelines. See, e.g., U.S.S.G. §1B1.3 ("relevant conduct" means "acts or omissions"); U.S.S.G. §4B1.3 ("pattern of criminal conduct" means "planned criminal acts occurring over a substantial period of time. Such acts may involve a single course of conduct or independent offenses.") Restricting "conduct" within RICO would be inconsistent, therefore, with "conduct" usage throughout the Code. Ironically, these other statutes are not necessarily supposed to be liberally construed.

[44] 84 Stat. 922, 947 (1970). See Equitable Relief at 532 n.21 (origin of clause traced to work of Edward Livingston between 1820 and 1825).

Turkette, 452 U.S. at 593 ("both preventive and remedial")[45] The Eighth

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Judicial hostility to change through legislation was common in the nineteenth century. James W. Hurst, The Growth of American Law 186 (1950). It became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed. David Wigdor, Roscoe Pound: Philosopher of Law 174 (1974). In fact, a majority of states have abolished the common law rule of strict construction. Civil Fraud Action at 245 n.25. See also id. at 288 n.150 (analysis of relation between rules of construction, including rule of lenity, and Liberal Construction Clause).

[45] Circuit courts faithfully follow the liberal construction mandate in criminal litigation. See, e.g., United States v. Angiulo, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990); United States v. Mazzei, 700 F.2d 85, 89-90 (2d Cir.), cert. denied, 461 U.S. 945 (1983); United States v. Frumento, 563 F.2d 1083, 1090-91 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); In re Billman, 915 F.2d 916, 921 (4th Cir.), cert. denied, 111 S. Ct. 2258 (1991); United States v. Elliott, 571 F.2d 880, 897-98 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Sutton, 642 F.2d 1001, 1003 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981); United States v. Grzywacz,

Circuit did not seek to justify its adoption of the manage or operate test in the teeth of RICO's Liberal Construction Clause. Candidly, the D.C. Circuit in Yellow Bus recognized that the Eighth Circuit's position was "the most restrictive view." 913 F.2d at 953. The D.C. Circuit then sought to justify its adoption of the illiberal view, however, by reference to dictionary meaning (id. at 954) and strict construction (id. at 955). Neither supports its position.

When it cited the dictionary, the D.C. Circuit unjustifiably ignored an

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603 F.2d 682, 685-86 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980); United States v. Godoy, 678 F.2d 84, 86-87 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983); United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); and United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988). This Court should do no less.

alternative--and more plausible--meaning set out in the same source. See Webster's Third New International Dictionary 473 (1961) ("behavior"). The rule of strict construction, too, did not warrant the D.C. Circuit's adoption of the "narrowest meaning." Turkette, 452 U.S. at 587-88 n.10 ("not an inexorable command to override common sense and evident statutory purpose. xxx [Strict construction] is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.") (quoting United States v. Brown, 333 U.S. 18, 25-26 (1948)). The D. C. Circuit, in short, conflated breadth, ambiguity, and vagueness. As such, it confused the kind of uncertainty of application that stems from breadth of meaning caused by the use of broad terms, the kind of uncertainty of application

that stems from multiplicity of meaning caused by ambiguity, and the kind of impossibility of application that stems from vagueness caused by the use of terms having no meaning.[46]

RICO is neither ambiguous nor vague; it is broad. Sedima, 473 U.S. at 499 (citing Haroco at 398) (RICO "demonstrates breadth," not "ambiguity."). See also H.J. Inc., 492 U.S. at 237 ("terms and concept of breadth") (citing Russello, 464 U.S. at 21).

The strict construction rule,

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[46] See Reed Dickerson, Fundamentals of Legal Drafting 22-33 (1965) (analysis of "major diseases of language:" generality, ambiguity and vagueness); G. Robert Blakey, Is Pattern Void for Vagueness?, 5 Civil RICO Report 6, 9 n.27 (Dec. 12, 1989).

moreover, has no proper application to RICO in light of the Liberal Construction Clause. The rule is merely "a principle of statutory construction."[47] It is not a constitutional requirement.[48] As such, subject to the constitutional void-for-vagueness doctrine, Congress may abrogate it.[49] Absent first amendment considerations, not present in this litigation, a statute--RICO included--must be judged, as applied, not on its

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[47] United States v. Batchelder, 442 U.S. 114, 121 (1979). See also Turkette, 452 U.S. at 588; Russello, 464 U.S. at 29 (citing Turkette); Sedima, 473 U.S. at 492 n.10.

[48] See, e.g., Tarrant v. Ponte, 751 F.2d 459, 466 (1st Cir. 1985).

[49] See generally Civil Fraud Action at 245 n.25 (rule analyzed and statutes collected); 288 n.150 (liberal and strict construction compared with void-for-vagueness doctrine); G. Robert Blakey, Foreword: Debunking RICO's Myriad Myths, 64 St. John's L. Rev. 701, 718-19 (1990) (collection of void-for-vagueness precedents).

face.[50] Here, the accountants, who engaged in "a number of reprehensible acts," 937 F.2d at 1324, can hardly be heard to complain in "surprised innocence" when their behavior is found to violate RICO.[51]

4. A Restrictive Construction of Conduct Within RICO Is Inconsistent With Congress' Own Understanding of RICO.

The "views of a subsequent Congress

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[50] See, e.g., Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 495 n.7 (1982).

[51] United States v. Ragen, 314 U.S. 513, 523-24 (1942) ("surprised innocence"). If the predicate offenses, are "not unconstitutionally vague, [then RICO]...cannot be vague either." Fort Wayne Books Inc., v. Indiana, 489 U.S. 46, 65-58 (1989); United States v. Masters, 924 F.2d 1362, 1367 (7th Cir.) (RICO constitutional as applied) (violation of RICO rather than predicate offense "a detail"), cert. denied, 111 S. Ct. 2019 (1991); S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (notice stems from predicate acts).

form a hazardous basis for inferring the intent of an earlier one."[52] "[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage."[53] Nevertheless, subsequent legislative developments, which "confirm"[54] a construction of "conduct" in RICO that is not limited to manage or operate and which would not exclude professionals, are entitled to "significant weight."[55]

Efforts to "reform" RICO after

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[52] Russello, 464 U.S. at 26 (quoting Jefferson County Pharmaceutical Ass'n v. Abbott Lab., 460 U.S. 150, 165 n.17 (1983)).

[53] United States v. Wise, 370 U.S. 405, 411 (1962).

[54] See Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980).

[55] Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980).

Sedima properly focused on Congress.[56] Bar associations[57] and the accounting profession[58] played leading roles. A major effort was made to exempt professionals.[59] Writing special rules for one group, however, is

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[56] See, e.g., Oversight on Civil RICO Suits: Hearings before the Sen. Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) (hereinafter "1985 Hearings.").

[57] See, e.g., id. at 579 (testimony of Arthur F. Mathews in behalf of Ad Hoc Civil RICO Task Force of Am. Bar Ass'n) (high-level managerial agent limitation should be adopted).

[58] See, e.g., id. at 243 (testimony of Ray J. Groves in behalf of American Institute of Certified Public Accountants).

[59] See, e.g., RICO Reform Act of 1989: Hearings before the Subcomm on Crime of the House Judiciary Comm., 101st Cong., 1st Sess. 455 (1989) (testimony of Robert L. Chiesa on behalf of Am. Bar Ass'n) ("conduct" should require "policy making power" to "insulate accountants").

controversial.[60] The proposed reform now pending in Congress does not provide special rules for special groups.[61] The accounting profession ought not now obtain, therefore, in this judicial forum, a limitation on RICO that it was not successful in obtaining in the political forum.

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[60] See, e.g., 134 Cong. Rec. E3720 (daily ed. Oct. 21, 1988) (Stat. of Rep. John Conyers, Jr.) ("I see no reason to give the likes of Boesky or Butcher in their stock fraud or bank fraud activities a special bill of relief.").

[61] H.R. Rep. No. 312, 102d Cong., 1st Sess. 7, 15 (1991) (reporting H.R. 1717) (Prior legislation rejected because it "would go too far in certain respects and give the appearance of favoring certain industries, such as the commodities, securities and savings and loan industries which are currently the subject of major fraud investigations; no limit on "conduct" adopted; "major participant" screen for "gatekeeper" approach "creates no special protection for any group....[A]ccountants, lawyers and investment bankers....will still be liable....").

II. A RESTRICTIVE CONSTRUCTION OF CONDUCT WITHIN RICO WOULD UNJUSTIFIABLY INSULATE FROM LEGAL RESPONSIBILITY MANY PIVOTAL PARTICIPANTS IN DEVASTATING SCHEMES TO DEFRAUD.

Article III of the Constitution does not grant a court power to redraft legislation because of its "appraisal of the wisdom and unwisdom of a particular [legislative] course...."[62] Nevertheless, an examination of the considerations implicated by Congress' action in 1970 is required by this Court's jurisprudence that plain meaning may be departed from to avoid absurd or surprising results.[63] The broad language

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[62] Diamond v. Chakrabarty, 447 U.S. 303, 318 (1980) (quoting TVA v. Hill, 437 U.S. 153, 194 (1978)). See also Airline Pilots Ass'n Int'l v. O'Neill, 111 S. Ct. 1127, 1135 (1991).

[63] See, e.g., United States v. Ryan, 284 U.S. 167, 175-76 (1931) (civil forfeiture provision narrowed to give it

chosen by Congress in RICO, however, is "neither absurd nor surprising."[64]

The controversy over RICO does not primarily center on its criminal provisions or its possible civil application in the areas of violence, the provision of illicit goods and services, or the corruption of unions and governmental entities. Instead, it focuses almost exclusively on the commercial fraud area. In 1970, however, Congress focused RICO on "fraud." 84

"a sensible construction").

[64] Turkette, 452 U.S. at 587. See also In Re Rouse, 221 N.Y. 81, 91, 116 N.E. 782, 785 (1917) (Cardozo, J.) ("consequences cannot alter statutes but may help to fix their meaning"), cert. denied, 246 U.S. 661 (1918). RICO sponsors, too, had professionals in mind. See Civil Fraud Action at 254 nn. 48 & 50 and 270 n.98. Such comments are a "weighty gloss." Galvan v. Press 347 U.S. 522, 527 (1954).

Stat. 922. It found that traditional "sanctions and remedies" were "unnecessarily limited in scope and impact." Id. at 923. It was well aware, in short, that "existing law, state and federal, was not adequate...." Turkette, 452 U.S. at 586. While almost two decades have passed since RICO became law, the task of controlling fraud remains formidable. "White-collar crime is 'the most serious and all-pervasive crime problem in America today.'"[65] Although this statement was made in 1980, there is no reason to think the problem has diminished in the meantime.

In 1974, the Chamber of Commerce

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[65] Braswell v. United States, 487 U.S. 99, 115 n.9 (1988) (quoting Hon. John Conyers, Jr., Corporate and White-Collar Crime, 17 Am. Crim. L. Rev. 287, 288 (1980)).

estimated the direct economic cost of fraud as $41.78 billion annually.[66] Given the inflation rate since the 1974 study, fraud likely costs society a figure more than four times that amount today.[67] The Chamber of Commerce study, moreover, did not account for the entire impact of fraud. White-collar crime has a "serious influence on the social fabric, and on the freedom of commercial

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[66] Chamber of Commerce of the United States, Handbook on White-Collar Crime: Everyone's Problem, Everyone's Loss 6 (1974). Obviously, these estimates can only be "ballpark" figures, for the typical perpetrator of a fraud does not file an honest "annual report." See President's Comm. on Law Enforcement & Admin. of Justice, Task Force Report: Crime and Its Impact--An Assessment 103 (1967).

[67] Annual Report of the U.S. Attorney General 42 (1985) ($200 billion).

and interpersonal transactions."[68] Because white-collar offenders often occupy positions of trust, their misdeeds impact beyond their immediate target. Former FBI Director William H. Webster aptly commented in 1982: "[T]hrough use of their positions of trust, cunning and guile, white-collar criminals undermine professional ... integrity ... and ... are responsible for the loss of billions of dollars annually...."[69] Consumers, savers, investors, legitimate businesspeople and governments are the victims of such fraud.

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[68] See generally Herbert Edelhertz, The Nature, Impact, and Prosecution of White Collar Crime 6-7 (1970) (hereinafter "Edelhertz").

[69] Hearings on the Department of State, Justice and Commerce, The Judiciary and Related Agencies: Appropriations for Fiscal Year 1983, Before a Subcomm. of the Comm. on Appropriations, House of Representatives, 97th Cong., 2nd Sess. 144 (1982).

A nationwide problem of thrift and bank failures, for example, is of epidemic proportions.[70] The President told the Nation in 1989 that "unconscionable risk-taking, fraud and outright criminality [were] factors"[71] that led to this crisis, which is now expected to cost at least $500 billion over thirty years.[72] Congressional studies agree with the President: At least one half of bank failures and one quarter of thrift failures involve

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[70] See generally Myths at 882-86; Note, Insider Abuse and Criminal Misconduct in Financial Institutions: A Crisis?, 64 Notre Dame L. Rev. 222 (1989).

[71] President's News Conference on Savings Crisis and Nominees, N.Y. Times, Feb. 7, 1989, at D9, col. 1.

[72] Michael Quint, New Estimate on Savings Bailout Says Cost Could Be $500 Billion, N.Y. Times, Apr. 7, 1990, at A1, col. 1 (reporting General Accounting Office estimate).

criminal activity by insiders.[73] Professionals played key roles in many of these failures.[74]

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[73] H.R. Rep. No. 1088, 100th Cong., 2d Sess. 2-13 (1988).

[74] See James S. Granelli, Keating's Advisors Under Fire: Attorneys Accountants Helped Massive Fraud Work Investors Lawyers Say, L.A. Times, Mar. 14, 1992, at D1, col. 2; Byron Harris, The S & L Looters Who May Get Away, Wall St. J. Feb. 12, 1990, A12, col. 3; Charles McCoy, Richard B. Schmit & Jeff Bailey, Hall of Shame: Besides S&L Owners, Host of Professionals Paved Way in Crisis, Wall St. J. Nov. 2, 1990, p.1, col. 6; Albert B. Crenshaw, Criminal Conduct Said to Play Role in 40% of S & L Failures, Wash. Post, July 19, 1990, at E1 (twenty percent of the failures had accountants, lawyers, brokers and other professionals at least responsible for malpractice); Leslie Wayne, Where Were The Accountants?, N.Y. Times, Mar. 12, 1989, §3 at 1, col. 2. See Lincoln Savings & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.) ("What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.").

Fraudulent financial reporting is a serious national problem. When fraudulent financial reporting occurs, widespread consequences result "with a sometimes devastating ripple effect."[75] Appropriately, since 1980, the major accounting firms at fault have had to pay millions of dollars to settle liability suits.[76] Little can be said for a

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[75] Report of the National Commission on Fraudulent Financial Reporting 4 (1987). See United States v. Benjamin, 328 F.2d 854, 863 (2d Cir.) (Friendly, J.) ("In our complex society, the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar."), cert. denied, 377 U.S. 953 (1964).

[76] George Russell, All Eyes On Accountants: A Once Comfortable Profession Undergoes Unprecedented Scrutiny, Time, Apr. 21, 1986, at 61. See also Alison Leigh Cowan, Big Law and Auditing Firms To Pay Millions in S & L Suit, N.Y. Times, Mar. 31, 1992, at 1, col. 1 (Ernst & Young and Jones, Day, Reavis & Pogue settle Keating litigation).

construction of "conduct" within RICO that would give these white-collar offenders a safe-harbor from their just deserts.

The fraud problem facing the Nation seems overwhelming, but it is not unsolvable. If RICO--federal and state--is used with other law enforcement tools, it can emerge, as Congress and the state legislatures intended, as an effective means for combatting fraud in the thrift and banking industries,[77] the pension

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[77] Both the RTC and FDIC use RICO. See, e.g., FSLIC v. Shearson-American Express, Inc., 658 F. Supp. 1331 (D.P.R. 1987); FDIC v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985). See generally Prosecuting Fraud in The Thrift Industry: Hearings before the House Subcomm. on Crim. Justice, 101st Cong., 1st Sess. (1989).

field[78] and the insurance industry.[79] For "[i]f substantial progress can be made in the prevention, deterrence and

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[78] See, e.g., Thornton v. Evans, 692 F.2d 1064, 1065 (7th Cir. 1982) (pension plan fraud) ("Evidence...traces a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence."). RICO is being used successfully on behalf of plan beneficiaries. See, e.g., Crawford v. LaBoucherie Bernard Ltd., No. 83-0780 (D.D.C. Aug. 15, 1984), aff'd, 815 F.2d 117 (D.C. Cir), cert. denied, 484 U.S. 943 (1987); Note, Who Should Pay When Federally Insured Pension Funds Go Broke? A Strategy For Recovering From Wrongdoers, 65 Notre Dame L. Rev. 308 (1990).

[79] State insurance commissioners are using RICO to vindicate the interests of the companies that have been defrauded. See, e.g., Schacht, 711 F.2d at 1356-58; North Carolina ex. rel. Long v. Alexander & Alexander Servs., Inc., 680 F. Supp. 746, 749-51 (E.D.N.C. 1988). See generally U. S. Government Efforts to Combat Fraud and Abuse in the Insurance Industry, S. Rep. No. 102-262, 102nd Cong., 2d Sess. 17 (1992) ("unless ... forceful action is taken ... tragedies will continue....").

successful prosecution of...[white-collar] crime, we may reasonably anticipate substantial benefits to the material and qualitative aspects of our national life."[80]

Restricting RICO will substantially cripple the federal courts' ability to apply RICO to achieve its remedial purposes. In 1970, Congress recognized that existing jurisprudence was inadequate to deal with patterns of criminal behavior, including fraud. The Nation cannot solely rely, moreover, upon public enforcement to bear the burden of policing fraud. Over forty-five years ago Justice Jackson rightly observed that "[t]he criminal law...[has] long proved futile to reach the subtle kinds of fraud

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[80] Edelhertz at 11.

at all, and able to reach grosser fraud, only rarely."[81] Public agencies charged with policing fraud will never be funded or staffed at adequate levels.[82] Civil RICO's treble damage mechanism, therefore, plays an essential role.[83]

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[81] Robert H. Jackson, The Struggle for Judicial Supremacy 152 (Vintage ed. 1941).

[82] See, e.g., Myths at 912-16 (analysis of underfunding of SEC and CFTC). The Commodity Futures Trading Commission has been for some time "thoroughly outgunned in the ongoing battle against commodity fraud." S. Rep. No. 495, 97th Cong., 2d Sess. 10 (1983).

[83] See Mosler v. S/P Enters., Inc., 888 F.2d 1138, 1143-44 (7th Cir. 1989) (RICO fraud) (Easterbrook, J.):

> Because [such] frauds are concealable, trebling is important to produce proper incentives. (citations omitted). If perpetrators pay what they took when they get caught, and keep the proceeds the rest of the time, then fraud is profitable. If victims recoup only what they lost, and face the burdens and uncertainties of the legal process plus the costs of their

Accordingly, the statute's civil provisions are necessary if the Nation is to combat and deter fraudulent activities successfully . Private lawsuits with the threat of treble damages may, in fact, be more effective in combatting fraud than the threat of criminal penalties.[84]

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own counsel, then victory will not make them whole, and the shortfall may mean that victims will not vigorously investigate and litigate. Trebling [under RICO] addresses both halves of this equation.

See generally Note, Treble Damages Under RICO: Characterization and Computation, 61 Notre Dame L. Rev. 526, 533-43 ("(1)encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.").

[84] Empirical studies, for example, show that the threat of treble damages, not criminal prosecution, is the backbone of the antitrust statutes. "Neither imprisonment nor monetary penalties pose...a credible threat to colluding firms....[T]he deterrent

Testimony presented to Congress in 1985 by the Department of Justice indicated:

> [C]ivil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind. These considerations suggest that private civil RICO enforcement in area[s] of organized criminality may have had a greater deterrent impact than is commonly recognized, and that both the threat and the actuality of private civil enforcement might be expected to produce even greater deterrence in the future.[85]

A restrictive construction of "conduct" within RICO, limiting it to manage or operate, would, therefore, deprive many

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effect...[comes] from...the likelihood of an award of private treble damages....". Michael K. Block, Roger G. Nold & Joseph G. Sidk, The Deterrent Effect of Antitrust Enforcement, 89 J. Pol. Econ. 429, 440 (1981).

[85] 1985 Hearings at 140-41 (testimony of Assistant Attorney General Stephen Trott).

fraud victims of access to a potent weapon in federal courts, as Congress designed it.

Nor is the potential for litigation abuse an acceptable reason for restricting the scope of civil RICO.[86] Allegations of civil RICO abuse should be dealt with by vigorously enforcing the existing remedies for general litigation abuse. RICO abuse will not be a problem so long as attorneys and the courts

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[86] Those who express this concern have the burden of proving:

1) that a substantial number of frivolous RICO suits are being filed.
2) that existing safeguards against such suits are not adequate to remedy them.
3) that new safeguards against such suits that are adequate cannot be designed, and
4) that the detriment from these suits outweighs the benefit from legitimate suits.

None of these burdens has been met. See Myths at 877-80.

"recognize the utility of existing remedial procedures."[87] The courts, too, should also be alert to the fact that "abuse arguments are more likely motivated by hostility to the RICO remedy."[88] As Justice Stevens observed in the context of the antitrust laws, "[f]rivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine."[89]

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[87] Michael Goldsmith & Penrod W. Keith, Civil RICO Abuse: The Allegations in Context, 1986 B.Y.U. L. Rev. 55, 103 (1984). (hereinafter "RICO Abuse"). The 1983 meeting of the United States Judicial Conference concluded that "the existing tools [to address frivolous litigation] are sufficient, but perhaps not fully understood or utilized." Report of the Proceedings of the Judicial Conference of the United States, Sept. 21-22, 1983, at 56.

[88] RICO Abuse at 104.

[89] Hoover v. Ronwin, 466 U.S. 558, 601 (1984) (Stevens, J., dissenting). He continued:

Our legal system has developed

Finally, lower courts have frankly acknowledged that their restrictive reading of RICO is motivated by a fear of a "flood of litigation."[90] Such fears are misplaced factually[91] and are a constitutionally impermissible factor to employ in construing a statute. This Court teaches that the fact that litigation might be a burden on courts is "not sufficient to justify a judicial decision to alter [a] congressionally

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procedures for speedily disposing of unfound claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not with the law....Id.

[90] See, e.g., McCarthy v. Pacific Loan, Inc., 600 F. Supp. 137, 139 (D. Haw. 1984).

[91] Myths at 869-73 (review of civil filing data).

[drafted remedial scheme]."[92] It is a legislative function to resolve "the pros and cons of whether a statute should sweep broadly or narrowly."[93] Congress resolved those "pros and cons" when it stated unambiguously that RICO is to be construed broadly. "[R]ewriting [RICO] is [, therefore,] a job for Congress, if it is so inclined." H.J. Inc., 492 U.S. at 249 (quoting Sedima, 473 U.S. at 495). As such, the accounting profession urges a constitutionally-suspect course of action when it asks this Court to rewrite RICO on its own. This Court should have no part of it.[94]

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[92] Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 512 n.13 (1982).

[93] United States v. Rodgers, 466 U.S. 475, 484 (1984).

[94] More than one hundred years ago, this Court noted that "[i]t is easy, by very ingenious and astute

CONCLUSION

In 1970, Congress directed that RICO be liberally construed to effectuate its remedial purposes. Excluding professionals from "conduct" within RICO would be an illiberal construction of the statute. It would hobble criminal enforcement of the statute. Civil RICO's private enforcement mechanism, too, is necessary if victims of fraud are to be adequately compensated. This Court should resist efforts to rewrite RICO restrictively. The Eighth Circuit's decision should, therefore, be reversed.

Respectfully submitted,

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construction, to evade the force of almost any statute, where a court is so disposed....[By] such a construction [it is possible to] annul [the statute] and [render] it superfluous and useless." Pillow v. Roberts, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.). Dean Roscoe Pound concluded that such "ingenious and astute" constructions (1) "tend[ed] to bring law into disrespect; (2)...subject[ed] the courts to political pressure; [and] (3)...invite[d] an arbitrary personal element in judicial administration." Roscoe Pound, III, Jurisprudence 488 (1959). It threatened, he found, to make "laws...worth little" and to "break down" the "legal order" itself. Id. at 490. See generally, Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982).